No. 07-606

In the Supreme Court of the United States

JOHN CARLO, INC., PETITIONER

v.

ELAINE L. CHAO, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

GREGORY F. JACOB
Solicitor of Labor

JOSEPH M. WOODWARD
Associate Solicitor

EDWARD D. SIEGER
Attorney
Department of Labor
Washington, D.C. 20210

QUESTION PRESENTED

Whether the determination by the Occupational Safety and Health Review Commission that petitioner, a corporation engaged in the business of installing sewer and water lines, had committed a willful violation of a regulation promulgated by the Secretary of Labor under the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.*, is supported by substantial evidence and otherwise in accordance with the law.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 12
Conclusion 21

TABLE OF AUTHORITIES

Cases:

AJP Constr. Inc. v. *Secretary of Labor*, 357 F.3d 70 (D.C. Cir. 2004) 3
Aquatek Sys., Inc., 2005 O.S.H. Dec. (CCH) ¶ 32,794 20
Archer-W. Contractors, 15 O.S.H. Cas. (BNA) 1013 (1991), petition for review denied, 978 F.2d 744 (D.C. Cir. 1992) 9
Asplundh Tree Expert Co., 7 O.S.H. Cas. (BNA) 2074 (1979) 21
Atlantic Battery Co., 16 O.S.H. Cas. (BNA) 2131 (1994) 7
Brock v. *L.E. Myers Co.*, 818 F.2d 1270 (6th Cir.), cert. denied, 484 U.S. 989 (1987) 13
Continental Roof Sys. Inc., 18 O.S.H. Cas. (BNA) 1070 (1997) 3
D.A. Collins Constr. Co. v. *Secretary of Labor*, 117 F.3d 691 (2d Cir. 1997) 13, 15
Danis-Shook Joint Venture XXV v. *Secretary of Labor*, 319 F.3d 805 (6th Cir. 2003) 13
Field & Assocs. Inc., 19 O.S.H. Cas. (BNA) 1387 (2001) 20

Cases—Continued: Page

Frank Lill & Son, Inc. v. *Secretary of Labor*, 362 F.3d 840 (D.C. Cir. 2004) 15
J.A.M. Builders, Inc. v. *Herman*, 233 F.3d 1350 (11th Cir. 2000) 12
Jensen Constr. Co., 7 O.S.H. Cas. (BNA) 1477 (1979) 9
Keystone Roofing Co. v. *OSHRC*, 539 F.2d 960 (3d Cir. 1976) 14
Lakeland Enters. of Rhinelander, Inc. v. *Chao*, 402 F.3d 739 (7th Cir. 2005) 3
L.R. Willson & Sons, Inc. v. *OSHRC*, 134 F.3d 1235 (4th Cir.), cert. denied, 525 U.S. 962 (1998) 13
Mountain States Tel. & Tel. Co. v. *OSHRC*, 623 F.2d 155 (10th Cir. 1980) 13
New York State Elec. & Gas Corp. v. *Secretary of Labor*, 88 F.3d 98 (2d Cir. 1996) 12, 13, 18
N&N Contractors, Inc. v. *OSHRC*, 255 F.3d 122 (4th Cir. 2001) 19
P. Gioioso & Sons, Inc. v. *OHSRC*, 115 F.3d 100 (1st Cir. 1997) 15
Pennsylvania Power & Light Co. v. *OSHRC*, 737 F.2d 350 (3d Cir. 1984) 13
W.G. Yates & Sons Constr. Co. v. *OSHRC*, 459 F.3d 604 (5th Cir. 2006) 13, 17
Westar Energy, Inc., 20 O.S.H. Cas. (BNA) 1736 (2004) 20

Statutes and regulations: Page

Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.* 2
29 U.S.C. 651(b)(1) 20
29 U.S.C. 654(a)(1) 2
29 U.S.C. 654(a)(2) 2
29 U.S.C. 655 2
29 U.S.C. 657 2
29 U.S.C. 658 2
29 U.S.C. 658(a) 2
29 U.S.C. 659(a) 3
29 U.S.C. 659(c) 3
29 U.S.C. 660(a) 4, 12, 14, 16
29 U.S.C. 661(a) 3
29 U.S.C. 661(b) 3
29 U.S.C. 661(j) 3
29 U.S.C. 666 2
29 U.S.C. 666(a) 3, 19
29 U.S.C. 666(b) 2
29 U.S.C. 666(e) 2
29 U.S.C. 666(j) 4
29 U.S.C. 666(k) 3, 19
5 U.S.C. 706(2)(A) 12
29 C.F.R.:
Pt. 1926, Subpt. P 4
Section 1926.650 4
Section 1926.650(b) 8

Regulations—Continued: Page

Section 1926.652(a) 4
Section 1926.652(a)(1) 6
Section 1926.652(b) 4
Section 1926.652(c) 4
Appendix A 4
Pt. 2200:
Section 2200.91 ..... 4, 11

In the Supreme Court of the United States

No. 07-606

JOHN CARLO, INC., PETITIONER

v.

ELAINE L. CHAO, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-5) is not published in the *Federal Reporter* but is reprinted in 234 Fed. Appx. 902. The Notice of Final Order of the Occupational Safety and Health Review Commission (Pet. App. 44-45) is unreported. The decision and order of the administrative law judge (Pet. App. 6-43) is reported at 2005 O.S.H. Dec. (CCH) ¶ 32,834.

JURISDICTION

The judgment of the court of appeals was entered on May 14, 2007. A petition for rehearing was denied on August 7, 2007 (Pet. App. 46-47). The petition for a writ of certiorari was filed on November 5, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Occupational Safety and Health Act of 1970 (OSH Act or Act), 29 U.S.C. 651 *et seq.* requires that a covered employer "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm." 29 U.S.C. 654(a)(1). A covered employer must also "comply with occupational safety and health standards" promulgated by the Secretary of Labor (Secretary). 29 U.S.C. 654(a)(2); see 29 U.S.C. 655 (directing Secretary to promulgate such standards).

The Secretary enforces these OSH Act statutory and regulatory requirements by conducting inspections and investigations, 29 U.S.C. 657, and issuing citations, 29 U.S.C. 658. In all citations, the Secretary is required to "fix a reasonable time for the abatement of the violation." 29 U.S.C. 658(a). The citation may also propose various civil penalties depending on the nature of the cited conduct. 29 U.S.C. 666.[1] "[A] civil penalty of up to $7,000" is authorized for each "serious violation." 29 U.S.C. 666(b). The Act provides that "a serious violation" exists

> if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment

---

[1] The Act authorizes criminal penalties, including up to six months of imprisonment and a fine of not more than $10,000 in situations where an employer's "willful[] violat[ion of] any standard, rule, or order promulgated" by the Secretary "cause[s] death to any employee." 29 U.S.C. 666(e).

> unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

29 U.S.C. 666(k). The OSH Act provides for further enhanced penalties in cases involving a "willful[]" violation: "Any employer who willfully or repeatedly violates" the statute or the Secretary's regulations "may be assessed a civil penalty of not more than $70,000 for each violation, but not less than $5,000 for each willful violation." 29 U.S.C. 666(a). A violation is "willful" if it is "committed with intentional, knowing or voluntary disregard for the requirements of the Act, *or* with plain indifference to employee safety." *Continental Roof Sys., Inc.*, 18 O.S.H. Cas. (BNA) 1070, 1071 (1997); accord *Lakeland Enters. of Rhinelander, Inc.* v. *Chao*, 402 F.3d 739, 747 (7th Cir. 2005); *AJP Constr., Inc.* v. *Secretary of Labor*, 357 F.3d 70, 74 (D.C. Cir. 2004).

An employer who receives a citation "has fifteen working days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty." 29 U.S.C. 659(a). If the employer gives such notice, the Secretary must notify the Occupational Safety and Health Review Commission (Commission), 29 U.S.C. 659(c), an independent agency whose members are appointed by the President with the advice and consent of the Senate, 29 U.S.C. 661(a) and (b). The matter is then assigned to a Commission-appointed administrative law judge (ALJ), 29 U.S.C. 661(j), who must "afford an opportunity for a hearing" and "issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty." 29 U.S.C. 659(c). Unless a member of the Commission "direct[s] that such report shall be reviewed by the Commission," the ALJ's order "become[s] the final order of the Com-

mission" 30 days after it is issued. 29 U.S.C. 666(j); see 29 C.F.R. 2200.91 (describing procedures for petitions for discretionary review of an ALJ's decision). "Any person adversely affected or aggrieved by an order of the Commission" may, in turn, file a petition for review with an appropriate court of appeals. 29 U.S.C. 660(a); see also 29 U.S.C. 660(b) (providing that Secretary may also obtain review or enforcement of final Commission order).

2. Petitioner is a corporation that was hired to install a sewer line down the middle of an existing roadway. Pet. App. 7. The installation required petitioner's employees to work in a trench that had been dug 14.5 feet down into "Type C" soil. *Id.* at 7, 13; see 29 C.F.R. Pt. 1926, Subpt. P, App. A (defining Type C soil as soil that is granular, submerged, or otherwise lacking in compressive strength). Under those circumstances, the Secretary's regulations required petitioner to protect employees in the trench from cave-ins by either "shoring" or "sloping." Pet. App. 2, 13; see 29 C.F.R. 1926.652(a), (b) and (c). Shoring involves use of a structure to support the sides of a trench, whereas sloping means excavating at a prescribed angle in order to prevent cave-ins. 29 C.F.R. 1926.650 (definitions of shoring and sloping).

By October or November of 2003, several months before the incident that gave rise to this proceeding, petitioner's general superintendent, John Solich, and its project superintendent, Lester Cox, had learned that the path of the excavation would cross under an existing gas line that ran perpendicular to the proposed sewer line. Pet. App. 2, 8, 30, 37. Solich and Cox unsuccessfully sought to have the owner of the gas line relocate it, and they met a number of times with other management

officials to discuss the situation. *Id.* at 2, 30, 37. At the conclusion of those meetings, Solich and Cox decided to defer further consideration of the problem until the work crew encountered the gas line. *Id.* at 37.

Petitioner's project foreman, James Jacobs, became aware of the gas line approximately three weeks before the accident that gave rise to this case occurred. Pet. App. 17. One week before the accident, foreman Jacobs discussed the situation with superintendent Cox, his immediate supervisor. *Id.* at 15-16, 17. The work crew had been shoring the 14.5 foot trench by using a 6-foot trench box stacked on top of an 8-foot trench box to support the trench's sides. *Id.* at 2, 13. Jacobs asked Cox "whether he had plans for how [the work crew was] to go under the gas line." *Id.* at 17. Cox responded that the crew would need to remove the trench boxes when they reached the gas line. *Id.* at 18. Cox also instructed Jacobs not to dig the trench wider than six feet. *Id.* at 18.

Two days before the accident, Jacobs and Cox discussed the gas line again. Pet. App. 18. Jacobs asked Cox whether Cox was "sure that's the way we need to do this?" *Ibid.* Cox responded: "Yes, pull the trenchbox." *Ibid.* Jacobs told Cox that the work crew would not be able to slope the trench to compensate for the absence of the trench boxes so long as they adhered to Cox's previous instruction to dig no wider than six feet. *Id.* at 19. Cox stated, "I understand that," and told Jacobs that petitioner "had bidded this job to be no wider than six foot." *Ibid.* Cox reiterated his instruction to remove the trenchbox later that same day, and in another conversation on the morning of the accident. *Id.* at 20.

Jacobs knew that complying with Cox's instructions would violate the requirements of the Act. Pet. App. 22.

But he did not discuss the issue with anyone else, "[b]ecause my job was to tell [Cox] and [Cox's] job was to go to the higher man. That's why we have a superintendent on the job." *Ibid.* Consistent with Cox's instructions, Jacobs told his crew not to slope the walls of the trench and to remove the top trench box when they reached the gas line. *Id.* at 20.

On March 31, 2004, foreman Jacobs removed the top trench box, pulled the lower box under the gas line, and directed two of petitioner's employees to enter the trench. Pet. App. 14. After the employees had been inside the trench for at least 20 minutes, a large clay ball dislodged, fell into the trench, and struck one of the employees, who eventually died from his injuries. *Id.* at 3, 13. After the cave-in, petitioner was able to slope the trench walls and complete the project without moving the gas line. *Id.* at 3, 9.

3. a. The Secretary cited petitioner for, *inter alia*, a willful violation of 29 C.F.R. 1926.652(a)(1), which states that "[e]ach employee in an excavation shall be protected from cave-ins by an adequate protective system." Pet. App. 12-13. Petitioner contested that citation, and a hearing was held before an ALJ during November 2005. *Id.* at 7.

b. On May 11, 2006, the ALJ issued a written decision and order (Pet. App. 6-43) that upheld the Secretary's citation for a willful violation of Section 1926.652(a)(1) of the regulations and assessed a civil penalty of $50,000. Pet. App. 7.[2]

---

[2] In the same decision and order, the ALJ vacated a citation alleging that petitioner had violated a different section of the Secretary's regulations by failing to stack large concrete pipes in an appropriate manner. Pet. App. 11-12.

With respect to the existence of a violation, the ALJ noted that "the Secretary ha[d] the burden of proving"

> (a) the applicability of the cited standard, (b) the employer's non-compliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (i.e., the employer knew or, with the exercise of reasonable diligence could have known, of the violative conditions.

Pet. App. 11 (quoting *Atlantic Battery Co.*, 16 O.S.H. Cas. (BNA) 2131, 2138 (1994)). As for the first three requirements, the ALJ noted that the parties had "stipulated that the cited standard, 29 C.F.R. § 1926.652(a)(1) is applicable," Pet. App. 13, "that the trench was not in conformity with that standard," *ibid.*, and that "[a]fter the accident, [petitioner] was able to adequately slope the trench walls without moving the gas lines," *id.* at 14. As for the fourth requirement, employer knowledge, the ALJ determined that petitioner, "through its foreman, James Jacobs, had knowledge of the violative conditions at the worksite on * * * the day of the accident." *Ibid.*

The ALJ next concluded that the violation was "a serious violation in that there was a substantial probability that death or serious physical harm could result from the violative conditions." Pet. App. 14-15. "Without adequate protection by shoring or sloping," the ALJ explained, "employees working in this excavating were exposed to the hazard of cave-in of the walls of the excavation." *Id.* at 15.

The ALJ also determined that the violation was willful. Pet. App. 15-32. Because petitioner "is a corpora-

tion which acts through its agents," the ALJ stated that it was necessary to determine "the state of mind of its agents acting on its behalf." *Id.* at 15. After recounting the relevant testimony, *id.* at 16-27, the ALJ found that both superintendent Cox and foreman Jacobs were "actually aware, at the time of the violative act, that the act was unlawful," and that they had "knowingly and deliberately proceeded to expose employees to the hazards of cave-in of the excavation walls without protection of employees by shoring or sloping." *Id.* at 29.

The ALJ determined that this awareness on the part of Cox and Jacobs was properly attributable to petitioner. Foreman Jacobs "was the competent person on site and directed the work of the other employees," and superintendent Cox "directed and had responsibility for all work done by [petitioner's] employees on the project." Pet. App. 16; see *id.* at 29. Both Cox and Jacobs had undergone the "competent person training required by 29 C.F.R. Subpart P-Excavations," *ibid.*, which meant that they were "capable of identifying * * * working conditions which are * * * hazardous, or dangerous to employees" and had "authorization to take prompt corrective measures to eliminate them," *ibid.* (quoting 29 C.F.R. 1926.650(b)). The ALJ noted that petitioner "is in the business of digging trenches and other excavations," and that the standard violated here "sets forth the basic requirements to protect employees in excavations." *Id.* at 29-30. "The situation of the gas line crossing the path of the trench was not an unexpected situation," and "[t]op management officials * * * knew about this condition for several months prior to the accident." *Id.* at 30. The ALJ also concluded that petitioner's safety manual showed "a heightened awareness * * * of the hazards resulting from failure

to protect employees in trenches by shoring or sloping." *Id.* at 30-31. Under those circumstances, the ALJ concluded that petitioner's "actions show intentional disregard of the requirements of the Act and plain indifference to those requirements and to employee safety." *Id.* at 31.

The ALJ next rejected petitioner's argument that the violation should be excused because it "was the result of unpreventable employee misconduct" (Pet. App. 32) of either foreman Jacobs or superintendent Cox. *Id.* at 32-41.[3] To make out such a defense, the ALJ stated, petitioner would need to establish that: "(1) it has established work rules designed to prevent the violations, (2) it has adequately communicated these rules to its employees, (3) it has taken steps to discover violations, and (4) it has effectively enforced the rules when violations have been discovered." *Id.* at 32 (quoting *Jensen Constr. Co.*, 7 O.S.H. Cas. (BNA) 1477, 1479 (1979)). In addition, because Jacobs and Cox were "supervisory employees," the ALJ stated that "additional analysis [was] required" and that petitioner was required to "show that it took all feasible steps to prevent the accident." *Id.* at 35, 39 (citing *Archer-W. Contractors*, 15 O.S.H. Cas. (BNA) 1013 (1991) (*Archer-Western*), petition for review denied, 978 F.2d 744 (D.C. Cir. 1992) (Table)); see *Archer-Western*, 15 O.S.H. Cas. at 1017 ("[S]ince it is the supervisor's duty to protect the safety of employees under his supervision[,] * * * [a] supervisor's involvement in the misconduct is strong evidence that the employer's safety program was lax.").

---

[3] The ALJ also rejected petitioner's contention that the accident was the result of unpreventable misconduct by Comer Lindley, the deceased employee. Pet. App. 33. That issue is not before this Court. Pet. i.

Applying those principles, the ALJ concluded that the supervisors' actions did not constitute unpreventable employee misconduct. Foreman Jacobs had "specifically followed the direct orders of Cox," who was both Jacobs's "direct supervisor" and "the only superintendent and [petitioner's] highest ranking supervisor on this project." Pet. App. 34. Cox, in turn, "supervised all crews in all areas of the project," "met with the foreman * * * and visited the crews daily, dealing with problems and compliance with safety and other regulations," and "had full authority to stop work and to hire and fire employees." *Ibid.* In addition, the ALJ determined that petitioner's safety manual "contained material errors as to [the Secretary's] trenching requirements regarding the appropriate degree of sloping for Type C soil * * * and the minimum height of a trench box above surrounding soil." *Id.* at 35. By failing to correct "these obvious errors or communicate the correct information to employees on the project prior to the accident," the ALJ stated, petitioner had "failed to establish specific work rules designed to prevent this violation." *Id.* at 35-36. The ALJ similarly found that Cox and Jacobs had not "received adequate safety training by [petitioner]," even though "they were responsible for communicating safety information to [other] employees," and that although "[e]mployees were given copies of [petitioner's] safety manual, * * * no effort was made to assure the employees understood its contents." *Id.* at 36.

The ALJ also found that petitioner's disciplinary system was "ineffective * * * on this project," and that although petitioner had fired Cox and Jacobs after the accident, both had also received high performance evaluations after the accident, and the separation notices did not cite "'conduct' as the reason for discharge" and

stated that petitioner "would rehire both Cox and Jacobs." *Id.* at 38-39. The ALJ noted that petitioner's management was aware of the gas line problem but collectively decided to address the situation when it arose, and that petitioner presented no evidence that higher management supervised or questioned superintendent Cox's handling of the situation. *Id.* at 37, 40-41. Under those circumstances, the ALJ found that petitioner "ha[d] failed to prove its defense that the willful violation of 29 C.F.R. § 1926.652(a)(1) was the result of unpreventable employee misconduct." *Id.* at 41.

c. Petitioner filed a petition for discretionary review with the Commission. Supp. C.A. R.E. tab 8; see 29 C.F.R. 2200.91. In its petition for discretionary review, petitioner stated: "When a supervisory employee has actual or constructive knowledge of the violative condition, the knowledge of that employee can be imputed to the employer. However, the employer can rebut the imputed knowledge by showing that the employer 'took reasonable measures to prevent the occurrence of the violation.'" Supp. C.A. R.E. tab 8, at 3 (citation omitted); see *id.* at 4 ("the issue before the ALJ was whether [petitioner] took reasonable measures to prevent the occurrence, thereby rebutting the knowledge imputed through foreman Jacobs").

On June 26, 2006, the Commission issued a Notice of Final Order stating that the case had not been selected for review and that the ALJ's order thus constituted the final order of the Commission. Pet. App. 44-45.

4. The court of appeals denied a petition for review and affirmed the Commission's order in an unpublished per curiam opinion. Pet. App. 1-5. After summarizing the facts and the ALJ's decision, *id.* at 2-5, the court stated that the ALJ's factual findings "are deemed con-

clusive" so long as they "are supported by substantial evidence" and that a reviewing court must "uphold the Commission's legal determinations unless they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *Id.* at 5 (quoting *J.A.M. Builders, Inc.* v. *Herman*, 233 F.3d 1350, 1352 (11th Cir. 2000)); see 29 U.S.C. 660(a); 5 U.S.C. 706(2)(A). Applying those standards, the court of appeals determined "that substantial record evidence supports the ALJ's findings and the decision is in accordance with the law." Pet. App. 5.

ARGUMENT

Petitioner contends (Pet. i) that this Court should grant review to decide whether the Secretary may "establish knowledge [of a violation] by imputing to the employer as a matter of law the knowledge of a supervisor who intentionally violates the Act and the employer's work rules without proving the supervisor's misconduct was foreseeable to the employer." The courts of appeals have reached different conclusions regarding whether the Secretary or the employer bears the burden of proving that an OSH Act violation was the result of unforeseeable employee misconduct, as well as whether and under what circumstances the actual or constructive knowledge of a supervisory employee may be charged to the employer itself.[4] As the Secretary argued in unsuc

[4] Most of the courts of appeals require the Secretary to prove that the employer knew or could have known of the violation, contrary to the Secretary's position that she bears the burden regarding employer knowledge only where she alleges a willful violation. See, *e.g.*, *New York State Elec. & Gas Corp.* v. *Secretary of Labor*, 88 F.3d 98, 107 (2d Cir. 1996) (*New York State Elec.*). Most courts, however, allow the Secretary to prove knowledge by imputing the actual or constructive knowledge of a supervisor to the employer, at least when a non-supervisory

cessfully seeking review of the Fourth Circuit's decision in *L.R. Willson & Sons, Inc.* v. *OSHRC*, 134 F.3d 1235 (4th Cir.), cert. denied, 525 U.S. 962 (1998), and in opposing review for case-specific reasons in *Brock* v. *L.E. Myers Co.*, 818 F.2d 1270, 1277 (6th Cir.), cert. denied, 484 U.S. 989 (1987), questions concerning the proper allocation of various burdens of persuasion are fundamental to the Secretary's enforcement of occupational safety and health standards. See Pet. at 15-17, *Herman* v. *L.R. Willson & Sons, Inc.*, 525 U.S. 962 (1998) (No. 98-188); Br. in Opp. at 7, *L.E. Myers Co., High Voltage Div.* v. *Secretary of Labor.*, 484 U.S. 989 (1987) (No. 87-246). Accordingly, this Court's review may be necessary in an appropriate case to clarify the relevant burdens on the Secretary and the employer in situations in which an employer asserts that a particular violation of safety

---

employee commits the violation. See, *e.g.*, *W.G. Yates & Sons Constr. Co.* v. *OSHRC*, 459 F.3d 604, 609 n.7 (5th Cir. 2006) (*W.G. Yates*); *Danis-Shook Joint Venture XXV* v. *Secretary of Labor*, 319 F.3d 805, 812 (6th Cir. 2003) (*Danis-Shook*); *New York State Elec.*, 88 F.3d at 105, 109-110; *Mountain States Tel. & Tel. Co.* v. *OSHRC*, 623 F.2d 155, 158 (10th Cir. 1980) (*Mountain States*). If the Secretary meets her initial burden, the employer may then present an affirmative defense of unpreventable employer conduct. See, *e.g.*, *D.A. Collins Constr. Co.* v. *Secretary of Labor*, 117 F.3d 691, 695 (2d Cir. 1997), and cases cited. The Fourth Circuit, however, does not impute a supervisor's knowledge to the employer and instead requires the Secretary to prove that a violation was not the result of unpreventable employee misconduct. See, *e.g.*, *L.R. Willson & Sons, Inc.* v. *OSHRC*, 134 F.3d 1235, 1240-1241 (4th Cir.), cert. denied, 525 U.S. 962 (1998). And the Third, Fifth, and Tenth Circuits do not impute a supervisor's knowledge of a violation when the supervisor commits the violation, unlike the Sixth Circuit, which allows imputation in those circumstances. Compare *W.G. Yates*, 459 F.3d at 607-608; *Pennsylvania Power & Light Co.* v. *OSHRC*, 737 F.2d 350, 357-358 (3d Cir. 1984); *Mountain States*, 623 F.2d at 158, with *Danis-Shook*, 319 F.3d at 812.

rules was the result of unforeseeable or unpreventable employee misconduct.

This case, however, would not be a suitable vehicle for addressing the existing tensions in lower court authority. Petitioner forfeited the ability to obtain judicial review of its claim that a supervisor's knowledge of his own misconduct may not be imputed to his employer by expressly espousing a contrary position before the Commission. Moreover, the court of appeals' per curiam decision is unpublished and non-precedential. In any event, the approach followed by the ALJ in this case is both reasonable and correct, and petitioner would not prevail even under its own proposed rule. Further review is not warranted.

1. The OSH Act expressly provides that "[n]o objection that has not been urged before the Commission shall be considered by the court [of appeals on review of a Commission decision], unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. 660(a); see *Keystone Roofing Co.* v. *OSHRC*, 539 F.2d 960, 963-964 (3d Cir. 1976) (holding that an objection is not "urged before the Commission" within the meaning of Section 660(a) unless it is pressed in a petition for discretionary review). Petitioner did not argue in its petition for discretionary review to the Commission that the Act "expressly prohibit[s] knowledge imputation in supervisory misconduct cases," Pet. 9, or that doing so "impermissibly shifts the burden of proof," Pet. 11. To the contrary, the petition for discretionary review *acknowledged* that "[w]hen a supervisory employee has actual or constructive knowledge of the violative condition, the knowledge of that employee *can* be imputed to the employer," and that it is the *employer's* task to "*rebut*" that imputation

of knowledge by showing that it took reasonable measures to prevent the occurrence of the violation. Supp. C.A. R.E. tab 8, at 3 (emphases added). Petitioner has not attempted to identify an "extraordinary circumstance[]," 29 U.S.C. 660(a), that would excuse its failure to raise its current argument before the Commission, nor did it attempt to do so before the court of appeals. Because the petition for discretionary review did not "convey[] the substance of [petitioner's current contention] face up and squarely, in a manner reasonably calculated to alert the Commission to the crux of the perceived problem," petitioner may not raise that contention as a basis for setting aside the Commission's decision. *P. Gioioso & Sons, Inc.* v. *OSHRC*, 115 F.3d 100, 107 (1st Cir. 1997); see *Frank Lill & Son, Inc.* v. *Secretary of Labor*, 362 F.3d 840, 844 (D.C. Cir. 2004); *D.A. Collins Constr. Co.* v. *Secretary of Labor*, 117 F.3d 691, 694-695 (2d Cir. 1997).

2. Further review is also unwarranted because the court of appeals' brief per curiam opinion is unpublished and non-precedential, and it is far from clear that the court of appeals adopted the approach petitioner attempts to ascribe to it. Contrary to petitioner's assertions, the court of appeals did not state that "the ALJ *properly* imputed [the supervisors'] actual knowledge of the violation to [Petitioner]." Pet. 5 (emphasis added and other emphasis deleted); see Pet. 17 (asserting that "[the Eleventh Circuit] imputed the supervisors' knowledge of their own misconduct to [p]etitioner as a matter of law"). The actual sentence from the court of appeals' opinion is: "The ALJ imputed Jacobs' actual knowledge of the violation to [petitioner]," and that sentence is contained in the portion of the court of appeals' decision that summarizes the ALJ's decision. Pet. App. 4. The

same is true of the court of appeals' statement, quoted in part in the petition for a writ of certiorari (at 5), that: "The ALJ also determined that the violation was willful and held that [petitioner], 'through Cox and Jacobs, was actually aware, at the time of the violative act, that the act was unlawful." Pet. App. 4 (quoting *id.* at 29).

The only statement clearly denominated as a holding in the court of appeals' brief decision in this case—which resolved all four of the arguments raised by petitioner in its petition for review, see Pet. C.A. Br. 1—is the following sentence:

> After carefully considering the briefs, reviewing the record on appeal, and having had the benefit of oral argument, we find that substantial record evidence supports the ALJ's findings and the decision is in accordance with law.

Pet. App. 5. It is true that the court of appeals did not express disagreement with any of the ALJ's reasoning—including the ALJ's conclusion that it was appropriate to impute superintendent Cox's and foreman Jacobs's knowledge of their own misconduct to petitioner, which the court of appeals had described earlier in its opinion. But the court of appeals did not expressly endorse all facets of the ALJ's reasoning either, and there were other bases upon which it may have resolved the supervisor-knowledge issue.

Although the court of appeals did not refer to 29 U.S.C. 660(a) in its brief opinion, the government had argued the forfeiture point, discussed above, extensively in its brief. See Gov't C.A. Br. 33-39. It is possible, therefore, that the court of appeals concluded that the ALJ's decision was "in accordance with the law" (Pet. App. 5) with respect to the supervisor-knowledge issue

because petitioner had forfeited the entitlement to contend otherwise. It is also possible that the court of appeals chose not to resolve the forfeiture issue, because it concluded that any possible error on the supervisor-knowledge issue was harmless. See Gov't C.A. Br. 30, 45-47 (arguing that, on the facts of this case, it did not matter which party bore the burden of proof with respect to the foreseeability of the misconduct); see also pp. 17-19, *infra*. But regardless of what the court of appeals did, or did not, decide in this particular case, its unpublished and unelaborated decision will not supply a rule of decision for future cases, and it thus does not commit the Eleventh Circuit to a course that conflicts with the decisions of any other court of appeals.

3. This case would also be an inappropriate vehicle because the ALJ's decision makes clear that resolution of the issue on which petitioner seeks review—that is, whether the Secretary or petitioner bore the burden of proof with respect to whether the violation of safety rules in this case was "foreseeable" (Pet. i)—makes no difference to the outcome of this case. Petitioner expressly acknowledges that "[w]hether a violation is foreseeable requires analysis of an employer's safety policy, training, and discipline," and that "[i]f an employer's safety training and supervision are inadequate, *the law deems a violation to be foreseeable.*" Pet. 8 (emphasis added). Here, the ALJ's findings in rejecting petitioner's unpreventable employee misconduct defense conclusively establish that the supervisory misconduct at issue here was entirely foreseeable. See *W.G. Yates & Sons Constr. Co.* v. *OSHRC*, 459 F.3d 604, 609 n.7 (5th Cir. 2006) (stating that "the required considerations for th[e unpreventable misconduct] affirmative defense closely mirror the foreseeability analysis required to

determine if a supervisor's knowledge of his own misconduct, contrary to the employer's policies, can be imputed to the employer"); *New York State Elec. & Gas Corp.* v. *Secretary of Labor*, 88 F.3d 98, 106 (2d Cir. 1996) ("This question [of employer knowledge] is, in substance, the same as the one presented when the employer invokes the unpreventable misconduct defense.").

In this case, the ALJ expressly found that petitioner's written safety policies contained no less than *nine* "obvious errors," and that the errors regarding the degree of necessary sloping and the required height for trench boxes meant that petitioner had "failed to establish specific work rules designed to prevent this violation." Pet. App. 35-36. Petitioner's own safety director admitted that neither foreman Jacobs nor superintendent Cox had "receive[d] total training as of the accident date," even though "they were responsible for communicating safety information to [other] employees," and the ALJ also found that although "[e]mployees were given copies of [petitioner's] safety manual, * * * no effort was made to assure the employees understood its contents." *Id.* at 36. As for discipline, petitioner presented "[n]o evidence" that its "management on this project issued anything other than verbal warnings to employees for safety violations prior to" the day of the accident, *id.* at 38, and the ALJ found that petitioner's decision to give Cox and Jacobs high performance evaluations *after* the accident and to recite non-cause-based reasons for their termination was "totally inconsistent with [petitioner's] claim that it adequately enforced its safety program and rules," *id.* at 39. Finally, as for supervision, petitioner's top management had been aware of the existence of the gas line months before the accident, and had made a considered decision "to deal with the problem

when it actually arose," *id.* at 37, and petitioner presented "[n]o evidence" that "anyone in [its] upper management supervised or questioned [superintendent] Cox's handling of the situation," *id.* at 40-41.

Based on those findings, many of which were made based on concessions by petitioner's own witnesses or the absence of any evidence to the contrary, it is clear that the outcome in this proceeding would have been the same even if the ALJ had required the Secretary to demonstrate that the violation of safety requirements that occurred here was foreseeable. Cf. *N&N Contractors, Inc.* v. *OSHRC*, 255 F.3d 122, 127 (4th Cir. 2001) (stating that because "the Commission opinion indicates that the constructive knowledge inquiry did not turn on burden of proof rules, * * * even if the Commission had impermissibly shifted the burden the error would be harmless").

4. Further review in this particular case is also unwarranted because the ALJ's analysis here was both reasonable and correct. The Act itself does not state how the Commission is to determine whether an employer has "willfully * * * violate[d]" a safety standard, 29 U.S.C. 666(a), and the statute's definition of "serious violation" does not specify how the Commission is to determine whether "*the employer* did not, and could not with the exercise of reasonable diligence, know of the presence of the violation," 29 U.S.C. 666(k) (emphasis added). Because petitioner is a corporation—and thus may act only through its agents and be said to "know of" something in the sense that its agents "know of" it—the proper question is *which* of petitioner's agents are sufficiently identified with petitioner such that their actions and knowledge are properly attributable to the corporation. And although petitioner asserts

(Pet. 12-13) that holding employers responsible for the knowingly wrongful acts of their supervisory employees would frustrate Congress's purpose of "stimulat[ing] employers * * * to institute new and to perfect existing programs for providing safe and healthful workplace conditions," 29 U.S.C. 651(b)(1), such a rule would actually provide the appropriate incentives to hire supervisors who will not engage in knowing misconduct in the first place.

Nothing in the statute, the regulations, or common sense suggests that it was unreasonable for the ALJ to hold petitioner responsible for the knowing and deliberate violation of safety standards that was personally ordered by superintendent Cox, "the only superintendent and [petitioner's] highest ranking supervisor on this project," Pet. App. 34, and personally overseen by foreman Jacobs, the person who "directed the work" at the worksite and who "was the highest ranking supervisor at the trench at the time of the accident." *Id.* at 14-15. That is particular true in light of the "obvious" errors in petitioner's safety manual, *id.* at 35, its failure to provide proper training, *id.* at 36-37, and the considered decision by petitioner's general superintendent to permit the site team "to deal with the problem [of the gas line] when it actually arose," *id.* at 37. Imposing liability in such a case does not amount to "a de facto policy of strict liability in supervisory misconduct cases," Pet. 14, or mean that the unpreventable employee misconduct defense is "illusory," Pet. 16.[5] Rather, it appropriately

---

[5] The Commission has issued a number of decisions finding no liability in situations where the violation was committed by a supervisory employee. See *Aquatek Sys., Inc.*, 2005 O.S.H. Dec. (CCH) ¶ 32,794, at 52,442 (2006); *Westar Energy, Inc.*, 20 O.S.H. Cas. (BNA) 1736, 1738-1742 (2004) (digest); *Field & Assocs. Inc.*, 19 O.S.H. Cas.

recognizes that the carefully considered and flagrant misconduct by various company officials in the chain of supervision for the project provides particularly "strong evidence that the employer's safety program was lax." *Archer-Western*, 15 O.S.H. Cas. (BNA) at 1017.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

GREGORY F. JACOB
Solicitor of Labor

JOSEPH M. WOODWARD
Associate Solicitor

EDWARD D. SIEGER
Attorney
Department of Labor
Washington, D.C. 20210

JANUARY 2008

(BNA) 1387, 1393-1394 (2001) (digest); *Asplundh Tree Expert Co.*, 7 O.S.H. Cas. (BNA) 2074, 2075, 2080 (1979).